

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DAY ISLAND YACHT CLUB,

Plaintiff,

v.

CITY OF UNIVERSITY PLACE,

Defendant.

NO.

COMPLAINT

**I. INTRODUCTION**

1. This is a citizen suit brought under the Clean Water Act (“CWA”), 33 U.S.C. § 1365. Plaintiff Day Island Yacht Club seeks a declaratory judgment, injunctive relief, and the imposition of civil penalties, as well as an award of costs, including attorney and expert witness fees, against Defendant City of University Place. The action is to address the Defendant City’s repeated and ongoing failure to maintain a sediment detention pond that is a known feature of the City’s stormwater system, and, thereby, allowing silt-laden City surface water to discharge to saltwater tidelands owned by Plaintiff and, thereafter, the Puget Sound. This failure violates the terms and conditions of the City’s coverage as a permittee under the Western Washington National Pollution Discharge Elimination

COMPLAINT - 1 of 25

()  
[4879-8447-6016]

LAW OFFICES  
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1 System ("NPDES") Phase II Municipal Stormwater Permit, which permit authorizes  
2 discharges, pursuant to conditions, from the City's drainage system to navigable waters  
3 of the United States, and, thus, violates §§ 1311(a) and 1342 of the CWA.

## 4 II. JURISDICTION AND VENUE

5 2. This Court has subject matter jurisdiction pursuant to 33 U.S.C. § 1365(a).  
6 The relief requested herein is authorized by 33 U.S.C. §§ 1319(d) and 1365(a).

7  
8 3. Pursuant to 33 U.S.C. § 1365(b)(1)(A), Plaintiff Day Island Yacht Club  
9 notified the Defendant City of its violations of the CWA and of Plaintiff's intent to sue  
10 under the CWA by letter, attached as **Exhibit 1**, that was sent via email and certified mail  
11 on August 9, 2022 ("Notice Letter"). The allegations in the Notice Letter are incorporated  
12 herein. Plaintiff notified the City's Mayor, the Administrator of the United States  
13 Environmental Protection Agency ("EPA"), the Administrator of EPA Region 10, and the  
14 Director of the Washington Department of Ecology ("Ecology") of its intent to sue  
15 Defendant by emailing and mailing copies of the Notice Letter on August 9, 2022.  
16

17 4. More than 60 days have passed since the notice was served and  
18 Defendant remains in violation of its NPDES permit and the CWA. The violations  
19 complained of in the Notice Letter are continuing or reasonably likely to continue. Neither  
20 EPA nor Ecology has commenced any action constituting diligent prosecution to redress  
21 these violations.

22 5. The source of the violations is located in Pierce County, Washington, within  
23 the Western District of Washington, and venue is therefore appropriate in the Western  
24 District of Washington pursuant to 33 U.S.C. § 1365(c)(1).  
25  
26

III. PARTIES AND STANDING

6. Defendant City of University Place is a municipal corporation formed under the laws of the State of Washington.

a. The City established a storm drainage and surface water management utility through which it operates and controls the storm drainage and surface water management within the City.

b. The Defendant City is a permittee under the Western Washington NPDES Phase II Municipal Stormwater Permit ("Permit"). The City is a regulated small Municipal Storm Sewer System (MS4) under the Permit (Permit #WAR045021).

7. Plaintiff Day Island Yacht Club ("Yacht Club") is a duly formed Washington nonprofit corporation that has paid all fees owing to the State of Washington.

a. The Yacht Club is comprised of approximately 375 members. The Yacht Club assists its members in safe, fun, and family-oriented boating, and provides facilities for docking, and moorage for member's boats.

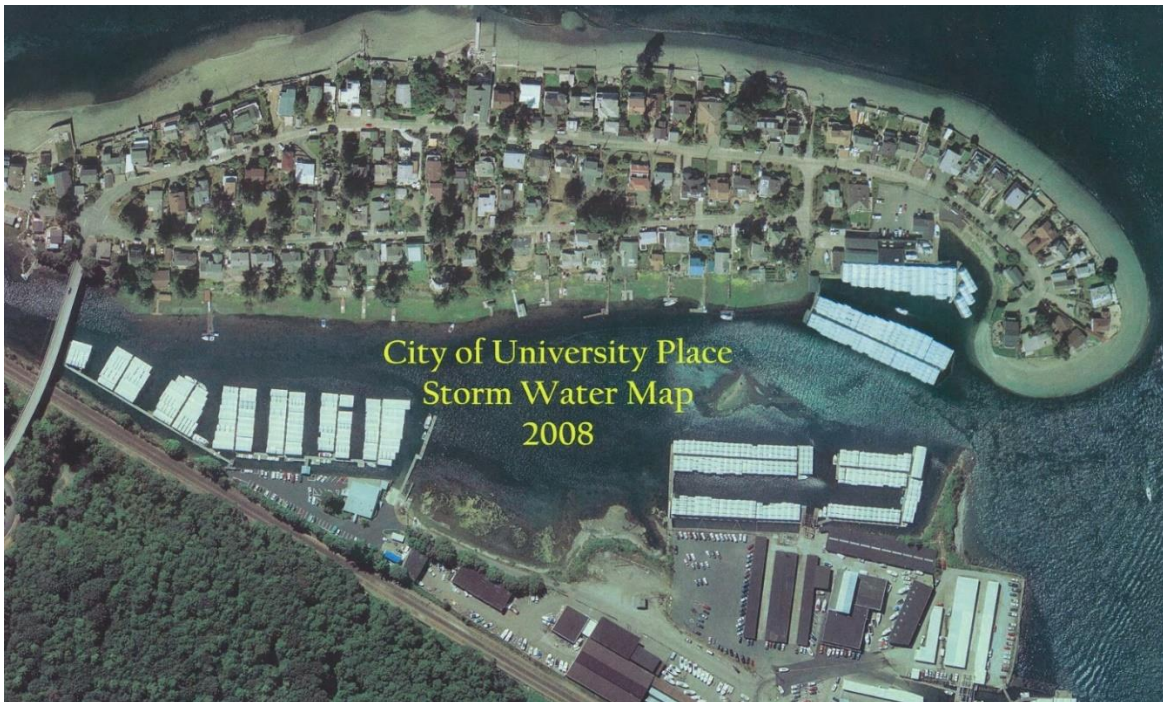
b. The Yacht Club owns improved real property located at 2120 91<sup>st</sup> Avenue West in University Place, Washington (Tax Parcel No. 0220092007). The Yacht Club also owns the abutting saltwater tidelands located in the Day Island Lagoon, which is a body of water located east of Day Island and is connected to Puget Sound through a narrow inlet at the north end of Day Island. Plaintiff's tidelands are identified as Tax Parcel Nos. 8950003660, 3425001072, 3430000230, and 3430200300 ("Yacht Club Tidelands"), and are improved with a 108-slip marina utilized by Yacht Club members for moorage.

c. The City's published Stormwater Map and Watershed and Outfall Inventory inform that surface water for the City of University Place is divided into 12 drainage

basins; and all the City's surface water eventually drains into Puget Sound. Included in the City's drainage basins is the Day Island Waterway Basin, which encompasses approximately 480 acres and drains as described in the Watershed and Outfall Inventory:

The Day Island Waterway watershed all drains northward by storm sewers, culverts and detention ponds to 24-inch storm sewer along 27<sup>th</sup> Street West. This storm sewer becomes 36 inches in diameter at the lower portion of the basin towards the northwest and parallels the north side of Day Island Bridge Road and discharges into the Puget Sound through a pair of 36-inch culverts underneath the railroad tracks. A small portion of the basin on the south side of Day Island Bridge Road drains to Puget Sound through a natural creek.

d. The Day Island Waterway Basin drains directly into the Yacht Club Tidelands where its marina is located. The cover page for the City's published Storm Water Map prominently depicts the Yacht Club Tidelands and marina that receive the City's collected stormwater. The Yacht Club Tidelands and marina are situated on the lower left quadrant of the map cover page below and just right of the Day Island Bridge.



1           8.     The Yacht Club, as an impacted property owner, has individual standing,  
2 and, as a membership organization, has both organizational and representational  
3 standing. The Yacht Club and its individual members are reasonably concerned about the  
4 effects of Defendant's discharge of pollutants, including sediments, to navigable waters  
5 of the United States, including specifically to the Yacht Club Tidelands in the Day Island  
6 Lagoon. The Defendant's discharges adversely affect enjoyment of the Yacht Club  
7 Tidelands, including interference with moorage at and use of the Yacht Club marina, boat  
8 navigation within the Yacht Club Tidelands and safe use of the pedestrian floating  
9 walkway. The recreational, economic, aesthetic, and/or health interests of Yacht Club and  
10 its members have been, are being, and will be adversely affected by Defendant's  
11 violations of the CWA. The relief sought in this lawsuit can redress the injuries to these  
12 interests.  
13

#### 14                                   IV.     FACTUAL AND LEGAL BACKGROUND

15           9.     Defendant City of University Place became incorporated as a municipal  
16 corporation in August 1995. Prior to that time, University Place was served and benefitted  
17 by certain Pierce County government services and certain City of Tacoma government  
18 services, including stormwater management facilities.  
19

20           10.    On August 28, 1995, the City Council adopted Ordinance No. 57, which  
21 established a storm drainage and surface water management utility to provide for the  
22 future operation and control of storm drainage and surface water management within the  
23 City. Thereafter, the City assumed control and responsibility over and operation of certain  
24 City of Tacoma and Pierce County stormwater facilities that, following incorporation, laid  
25 within the City of University Place or became necessarily a part of the drainage system  
26

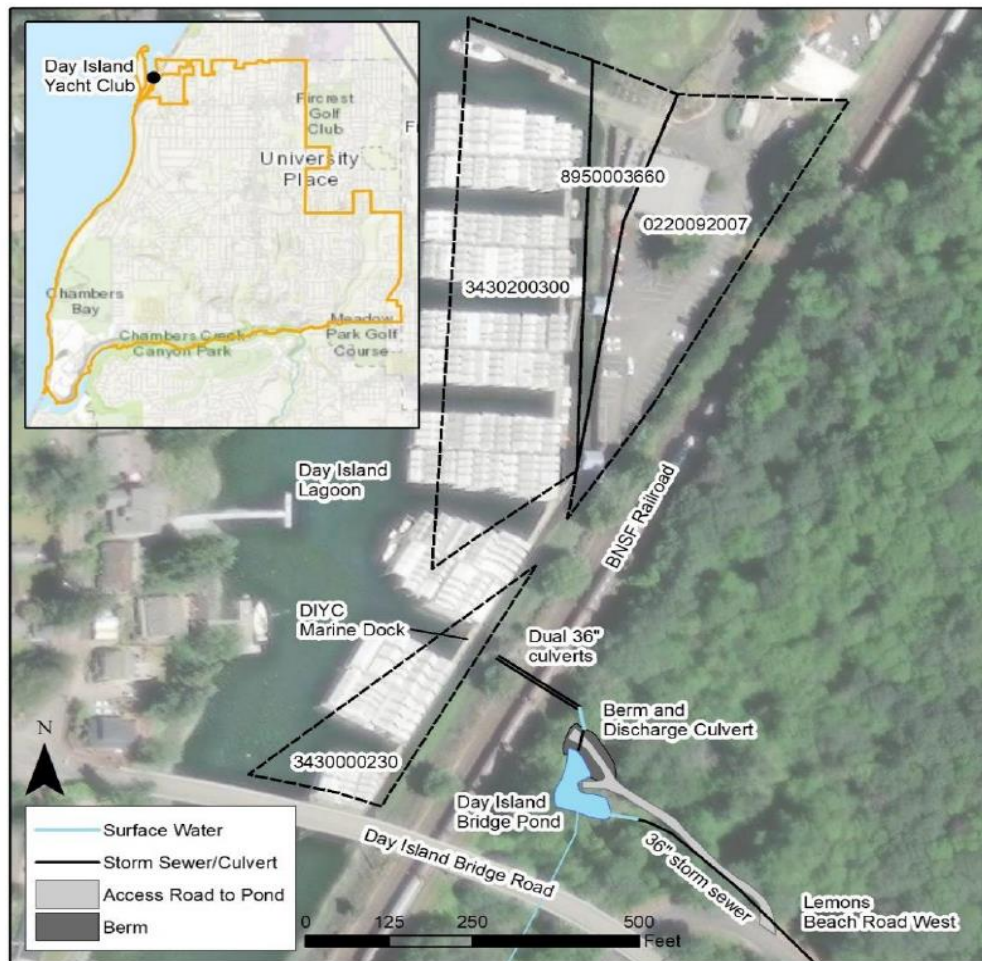
1 supporting the newly incorporated City. Through Ordinance 57, the City also established a  
2 surface water management fund, and authorized receipt and collection of fees from its  
3 citizenry to operate and maintain the storm water facilities (adopting the Pierce County  
4 rates).

5 **The Day Island Bridge Pond And The City's Modifications To Improve Sediment Detention**

6 11. Included in the stormwater facilities over which the City assumed control,  
7 operation and responsibility is a detention/sediment pond situated just northwest of  
8 where Day Island Bridge Road West travels over Lemon Beach Road West ("Day Island  
9 Bridge Pond"). The Day Island Bridge Pond receives large quantities of stormwater  
10 collected from a vast area within the University Place stormwater drainage system (the  
11 480-acres Day Island Waterway Basin). As noted earlier, this basin drains northward by  
12 storm sewers, culverts, and detention ponds to a 24-inch storm sewer along 27<sup>th</sup> Street  
13 West. This storm sewer becomes 36 inches in diameter at the lower portion of the basin  
14 towards the northwest and parallels the north side of Day Island Bridge Road and  
15 discharges into the Puget Sound through a pair of 36-inch culverts underneath the  
16 railroad tracks.  
17  
18

19 12. The Day Island Bridge Pond is between the 36-inch storm sewer and the  
20 twin culverts under the railroad. More specifically, the Day Island Bridge Pond receives  
21 water from the storm sewer, drains under a pond embankment berm through another  
22 approximately 36" inch culvert, and then discharges through the two twin pipes that are  
23 located under the BNSF railroad tracks. It is thus an essential component of the City's  
24 public drainage system. These City stormwater facilities and their proximity to the Yacht  
25 Club Tidelands and marina are depicted on the following page.  
26





13. The Day Island Bridge Pond, as well as its need for repair and ongoing maintenance, was acknowledged early in the City's incorporation. On August 17, 1998, the City adopted Ordinance 201, through which it adopted its first Comprehensive Storm Drainage Plan. The Comprehensive Storm Drainage Plan appended to Ordinance 201 was in draft form and dated August 13, 1998.

14. Ordinance 201 expressly stated: "the City through this Comprehensive Storm Drainage Plan has identified problem areas requiring capital investments for storm drainage systems *to protect citizens and property;*" and "...the City's storm drainage system *is in need of on-going maintenance to assure the reliability of the drainage*

1 **system**, to extend its useful life, and to enhance their performance in conveying and  
 2 treating flows.” (Emphasis added.) The adopted Storm Drainage Plan, which the City  
 3 acknowledged as “an official regulation of the City,” specifically identified the Day Island  
 4 Bridge Pond as part of the system and in need of repair to address sediment build up.

5 15. The purpose of this Comprehensive Storm Drainage Plan was stated in  
 6 chapter 1 of the Plan:  
 7

8 Since its incorporation, the City of University Place has assumed the  
 9 responsibility for surface and stormwater management within the  
 10 City’s boundaries. There currently exist a number of stormwater-  
 11 related problems within the City. Unless proper surface water  
 12 management strategies are implemented, continued development  
 13 will increase pressures on the drainage infrastructure and receiving  
 waters, and opportunities to cost effectively correct existing problems  
 may be lost. To develop such strategies, the city of University Place  
 authorized Earth Tech to conduct studies of the City’s surface and  
 stormwater systems and prepare a Surface Water Plan.

14 16. Toward the above-stated objective, the Plan included a Capital  
 15 Improvement Program to address “a number of problems in the City’s drainage  
 16 infrastructure” and recommended specific improvements. Among the “problems”  
 17 identified was the Day Island Bridge Pond. More specifically, the Plan identified a need to  
 18 reconfigure and repair this Pond to address sediment build up, as well as the need to  
 19 provide ongoing pond maintenance, including ongoing sediment removal. The project was  
 20 identified in the Plan as Project 11 and is described at page 6-4:  
 21

22 The pond known as the ‘Day Island Bridge’ pond is located  
 23 immediately east of the railroad tracks and north of the Day Island  
 24 Bridge Road. This pond was historically the responsibility of the City of  
 Tacoma [prior to the City’s incorporation]. The pond discharge is  
 25 tidally influenced as evidenced by marine growth around the inlet of  
 26 the twin discharge pipes. ***With more frequent cleaning, the pond’s  
 sediment removal efficiency can be enhanced. This will require  
 improvement of access road into the pond to facilitate regular  
 maintenance.***



1        ***The pond should also be reconfigured to improve sediment removal***  
 2        ***and concentrate sediment deposition within in a smaller area in the***  
 3        ***facility, thereby enhancing discharge quality and maintenance***  
 4        ***efficiency. The pond should be excavated to remove accumulated***  
       ***sediments and create multiple cells to promote sedimentation.***  
       (Emphasis added.)

5        17.     Notably, the Day Island Bridge Pond was a subject of state court litigation;  
 6        and the City became a party to that litigation shortly after it incorporated in 1995. The  
 7        trial court in that action expressly found that the City “assumed jurisdiction and control,  
 8        legally and factually, over the storm sewer system within the boundaries of the City of  
 9        University Place.”<sup>1</sup> This storm sewer system included the Day Island Bridge Pond. The  
 10       litigation put the City on notice that, with incorporation, the City assumed a duty to  
 11       maintain the Day Island Bridge Pond along with its other stormwater management  
 12       facilities.  
 13

14       18.     The City expressly acknowledged this lawsuit and the need to improve and  
 15       maintain the transferred stormwater facilities through Ordinance No. 202, which was also  
 16       adopted on August 17, 1998 – the same day the City adopted the Comprehensive  
 17       Stormwater Drainage Plan. The City stated in the recitals to Ordinance No. 202:

18                Whereas, shortly after incorporation the City was joined to a lawsuit  
 19                alleging damages for trespass and inverse condemnation arising out  
 20                of surface and storm water management facilities which had been  
 21                built by and owned by Pierce County prior to incorporation but which  
                  were transferred to the ownership of the City upon incorporation.

22       Due to this fact and others, the City declared in the recitals: “the City’s storm drainage  
 23       and surface water management utility needs to accumulate additional reserves to pay for  
 24       necessary system improvements identified in the City’s Comp Storm Drainage Plan.”

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25       <sup>1</sup> *Day Island Yacht Club v. Pierce County, City of Tacoma and City of University Place*, Pierce County cause  
 26       no. 90-2-00308-1, (Order Denying and Partially Granting Motion for Summary Judgment dated December 6,  
       1996). These state law claims, which did not assert any CWA claims, were resolved in 1997 through an  
       accepted Offer of Judgement.

1 Based on these recitals, the City increased the storm drainage and surface water  
2 management fees charged to its citizenry “to better reflect the costs of the facilities which  
3 the City needs to build to improve water quality.”

4 19. The Comprehensive Storm Drainage Plan was finalized in August 1999. All  
5 the language quoted above from the draft Plan dated August 13, 1998 remained the  
6 same in the final Plan, except, in the final Plan, Project 11 was labeled as “Retrofit Day  
7 Island Bridge Pond.” Records obtained from the City through Public Records Act requests  
8 reveal that Project 11 to Retrofit the Day Island Bridge Pond was advanced and  
9 completed.  
10

11 20. On or around July 16, 1999, the City Manager accepted and signed a  
12 design proposal contract with consulting engineers Gray & Osborne, Inc. Gray & Osborn  
13 referred to the project as: “Stormwater Project – 27<sup>th</sup> Street Detention Pond,” presumably  
14 because the detention pond received water from the 24-inch storm sewer that runs along  
15 27<sup>th</sup> Street West before it becomes 36 inches in diameter at the lower portion of the  
16 basin towards the northwest and then parallels the north side of Day Island Bridge Road.  
17 The accepted contract described the design project as follows:  
18

19 The 27<sup>th</sup> Street pond will be divided into two cells to enhance water  
20 quality in regards to creating a sedimentary trap. Additionally, the  
21 pond will be mapped in regards to its existing physical limits, edge of  
22 vegetation, access, fence pipe and structure locations, inlet and  
23 outlet pipe elevations, pipe sizes mapped beneath railroad tracks,  
24 pond elevation ‘soundings’, and pond size (storage capacity)  
25 calculated. Installation of small, ‘low flow’ by-pass pipe beneath berm  
26 area (between cells) will be provided.

27 The accepted contract also stated that the bid “assumes City will do construction.”

28 21. In or around October 1999, Gray & Osborne prepared and provided the City  
29 draft 27<sup>th</sup> Street West Detention Pond Repair Design Drawings (“Gray & Osborne Repair

1 Plans"). The Gray & Osborne Repair Plans include details of the original pond design,  
2 including pond bottom elevations, inlet and outlet pipe inverts. The repair designs  
3 included construction of a berm within the northern end of the pond that would facilitate  
4 pond maintenance by dividing the pond into two cells, creating a forebay to promote  
5 settlement of solids and prevent tidal backflow into the pond. The Gray & Osborn Repair  
6 Plans called for excavation of soil and sediment to a depth 2 feet below the invert of the  
7 36" concrete outlet pipe (upstream of the twin concrete culverts that discharge into the  
8 Day Island Tidelands). On information and belief, the purpose of this 2-foot sump was to  
9 reduce the velocity of stormwater flows from the 27<sup>th</sup> Street West storm sewer and allow  
10 for sediment to settle before discharging out of the pond and into the lagoon.  
11

12 22. In or around October 1999, the U.S. government promulgated Federal  
13 NPDES Phase II Rules, which, for the first time, subjected the City to NPDES permit  
14 coverage requirements. Prior to that time, NPDES permit coverage (Phase I NPDES  
15 Permit) was limited to municipalities with a population of 100,000 or greater.  
16

17 23. On November 15, 1999, the City adopted Ordinance No. 256, which again  
18 adjusted the storm drainage and surface water management fees "to reflect the costs of  
19 the facilities which the City needs to build to improve water quality." In this Ordinance, the  
20 City expressly acknowledged "adoption of Phase II of the National Pollution Discharge  
21 Elimination System rules which mandate stormwater improvements for the City."  
22

23 24. In or around August 2000, Gary Cooper, the City's then Public Works  
24 Superintendent, signed and submitted to the City's Department of Planning and  
25 Community Development ("Planning Department") a land use application, shoreline  
26

1 substantial development permit application and a State Environmental Policy ("SEPA")  
2 Checklist to obtain authorization to repair and modify the Day Island Bridge Pond.

3 25. In the SEPA Checklist, the Public Works Superintendent described the  
4 proposal: "Maintenance and improvements of regional stormwater detention facility,  
5 including 135 tons of fill and addition of backflow control devices on drain culverts." He  
6 represented the then current conditions of the site as:

7  
8 Large pond area which collects sediments and distributes storm  
9 water from the northern region of the City. The area is also tide  
influenced by two 32" culverts which drain into Puget Sound.

10 When asked to identify any surface water body on or in the immediate vicinity (including  
11 seasonal streams and wetlands), the Public Works Superintendent represented:

12 36" Culvert which drains storm water from the northern region of the  
13 City to the pond area that collects sediment, which is presently full, to  
14 twin 36" culvert pipes under the railroad tracks and out to the Puget  
Sound.

15 He did not identify any streams or wetlands.

16 26. The Public Works Superintendent explained in the SEPA Checklist that the  
17 proposal would create "detention/settlement cells and maintenance access." The project  
18 also included installation of two one-way back-flow doors, also referred to as tidal gates,  
19 on the twin drainage pipes that run underneath the railroad tracks to eliminate tidal  
20 influence from Puget Sound on the detention pond.

21  
22 27. In the land use application, the Public Works Superintendent represented  
23 that the proposed work in the pond would "allow area for silts to settle before water  
24 discharges to Puget Sound." For a more detailed description of the proposed project, the  
25 Public Works Superintendent submitted and referenced in the SEPA Checklist the Gray &  
26 Osborne Repair Plans.

1           28. On or around September 6, 2000, the City's SEPA Responsible Official  
2 issued a Mitigated Determination of NonSignificance ("MDNS"). The MDNS, which also  
3 described the project as "maintenance and improvements of regional stormwater  
4 detention facility," was sent out to local and state agencies for comment, including  
5 Ecology. Notice of the project application and the MDNS was also sent to the Yacht Club  
6 as a property owner within in 300 feet of the project site.  
7

8           29. On or around October 30, 2000, Ecology provided a SEPA comment letter  
9 on the City's proposal for "maintenance and improvements of the regional stormwater  
10 detention facility." Ecology did not express any material concerns regarding the project.  
11 Ecology did advise the City that it should contact the U.S. Army Corps of Engineers to  
12 determine if the Army Corps has additional permit requirements for the project.  
13

14           30. The shoreline substantial development permit ("SSDP") that the City  
15 requested for its pond repair project required approval by the City's Hearing Examiner. On  
16 or around April 3, 2001, the City's Planning Department issued a Staff Report with  
17 recommendations to the City's Hearing Examiner. Planning Department staff, based on  
18 representations made by the City's Public Works Superintendent and other review,  
19 represented to the Examiner: "The proposed work is designed to improve water quality by  
20 removing silt and sediment from water before it is discharged to Puget Sound." The Staff  
21 Report attached (as Exhibit C) the Gray& Osborne Repair Plans, representing that those  
22 drawings were the "Site Plan and Associated Details" for the project.  
23

24           31. On or around April 13, 2001, City Hearing Examiner Stephen Causseaux, Jr.  
25 approved the requested SSDP and authorized the repairs. The Examiner found that the  
26 pond is "a regional stormwater detention pond which collects sediments before



1 discharging storm water to Puget Sound.” He also found that “[t]he storm drainage pond  
2 accommodates storm water flow from the north portions of the City.” The Examiner  
3 described the proposed project, which he ultimately approved and authorized, as follows:

4           The Applicant is requesting a SSDP to allow regrading of an existing  
5 storm water detention pond and installation of rock spalls to create  
6 two siltation settlement cells. The application proposes removal of  
7 250 cubic yards of siltation material. Applicant also proposes  
8 installation of two one-way back flow doors on the two 32” culverts  
9 that convey water from the pond to Puget Sound.

10 On behalf the City’s Public Works Department, Mary Holloway appeared before the  
11 Examiner and “testified that they propose regrading the pond to create two separate  
12 sediment cells and that the water discharge to the Sound will be cleaner.”

13           32. As a condition of SSDP approval, the Examiner required the City to “comply  
14 with all permit requirements of state and federal agencies including Army Corps of  
15 Engineers.” In or around April 2001, Ms. Holloway, on behalf of Public Works, contacted  
16 the Army Corps to inquire if any Army Corps permits are required before constructing the  
17 project. On information and belief, including an April 23, 2001 email between Holloway  
18 and City planner Isaac Conlen provided in response to Public Records Act requests to the  
19 City, the City represented to the Army Corps that the City was “making improvements to  
20 an existing facility to improve water quality.” Based upon this same April 23, 2001 email  
21 it is believed that the Holloway emphasized to the Army Corps that “[t]he improvements  
22 are occurring within the existing storm pond, the pond is located shoreward of the  
23 ordinary high water mark and the goal is to improve water quality.”

24           33. By email dated April 26, 2001, Holloway reported to Conlen: “No permit  
25 required. Army Corps does not regulate artificial water ponds unless they have been  
26 abandoned and will be reactivated.” By letter dated May 14, 2021, the City forwarded to

1 Ecology the Hearing Examiner's April 13, 2001 decision approving the SSDP, along with  
2 the City's Staff Report (with attachments, including the Gray & Osborne Repair Plans), the  
3 application materials and SEPA MDNS. In this letter, the City also represented to Ecology:  
4 "Army Corps of Engineers does not has indicated [sic] that a 404 permit is not required  
5 for this project."  
6

7 34. On information and belief, including information contained in City public  
8 records, the City constructed the pond improvements as planned and approved by the  
9 Examiner in late 2001 and/or early 2002. Invoices in the City records, including  
10 contracts/invoicing from Randles Sand & Gravel indicate approximately 425 tons of  
11 waste (roughly 265 cubic yards) were removed from the site, which is consistent with the  
12 plan and approval to remove 250 cubic yards of siltation material. Randles Sand & Gravel  
13 contracts/invoices also indicate delivery of 125 tons of rock, which is consistent with  
14 installation of the planned berm to divide the pond into two cells. Finally, construction  
15 photographs from the City's public records circa Fall 2001, and pond photos date  
16 stamped February 6, 2002, indicate that the City did, in fact, construct the project as  
17 depicted on the Gray & Osborne Repair Plans and described in the City's project  
18 application material.  
19

20 35. Unfortunately, based on City representations, the City failed to prepare as-  
21 built plans documenting the completed work or the storage capacity of the pond upon  
22 completion. The pond photographs date stamped February 6, 2002, as well as aerial  
23 photographs, however, provide evidence that the pond, following the City's  
24 improvements, had sufficient capacity to function as a sediment detention pond.  
25  
26

36. The Gray & Osborne Repair Plans dictated 2 feet of dead storage, and, consistent with that design, a Randles Sand & Gravel contract was for the disposal of 265 cubic yards of waste material from the site. A construction photograph circa Fall 2001 from the City public records (photograph "a") depicts the elevation of the outfall during excavation of the pond. While an absolute measurement cannot be obtained from this photograph, it nonetheless reveals that a significant amount of sediment was excavated underneath the outfall. The presence of ponded water in pond photograph date stamped February 6, 2002 (photograph b) demonstrates that a sufficient amount of dead storage was available for the Pond to hold water between tidal cycles and act as a detention basin.



37. An aerial image taken in 2001 or 2002, depicted with annotations below, shows a clear view of the pond features. The berm and access road near the pond are clear of vegetation. The pond's discharge culvert is readily visible. Significantly, the pond itself is full of water, indicating excavation was sufficient to create a functioning sump.

1 The conditions depicted in the following aerial image further confirm that the features  
 2 depicted in the Gray & Osborne Repair Plans were present post-construction.



38. Recall that the Retrofit Day Island Bridge Project (Project 11) described in  
 the City's first Comprehensive Storm Drainage Plan stated:

The pond should also be reconfigured to improve sediment removal and concentrate sediment deposition within in a smaller area in the facility, thereby enhancing discharge quality and maintenance efficiency. The pond should be excavated to remove accumulated sediments and create multiple cells to promote sedimentation.

The Gray & Osborne Repair Plans presented a design consistent with the Retrofit Day Island Bridge Project and the photographs depicted above confirm that the retrofit construction in fact occurred. From the time the City incorporated, the Day Island Bridge Pond was a known feature of the City's regional stormwater facilities; and this was confirmed in the City's pond modification application materials in which the City referred to the pond as a "regional stormwater detention facility." The City obtained permitting approval to repair and retrofit to this regional stormwater detention facility for the express purpose of creating a sedimentation pond that will improve water quality before City

1 stormwater is discharged to Puget Sound. As retrofitted, the Day Island Bridge Pond was  
2 the final BMP in removing the sediment load from the 480 acres of suburban runoff  
3 before it was discharged to the Yacht Club Tidelands in the Day Island Lagoon.

4 **The City's Failure To Maintain And The Current Condition Of The Day Island Bridge Pond**

5 39. Recall that the City's first Comprehensive Storm Drainage Plan also stated  
6 regarding Project 11:

7  
8 With more frequent cleaning, the pond's sediment removal efficiency  
9 can be enhanced. This will require improvement of access road into  
the pond to facilitate regular maintenance.

10 Unfortunately, though the access road was constructed to facilitate the maintenance  
11 contemplated by the Plan, the City failed to carry out this cleaning and sediment removal  
12 necessary to maintain the intended sedimentation purpose of the Day Island Bridge  
13 Pond, which again, is a known feature of the City's stormwater management facilities and  
14 was constructed for the purpose of preventing discharge of silt-laden surface water.

15 40. While the City installed the tidal gates, they became inoperable. The City  
16 did not repair or replace the tidal gates and, as a result, the tidal influence on the pond  
17 was not eliminated or reduced as the City planned. This unmitigated tidal influence  
18 reduced the effectiveness of the pond sump.

19 41. The City also failed to remove sediment from the pond to maintain the  
20 necessary elevation for a functioning sump. In the absence of maintenance, the Day  
21 Island Bridge Pond has filled with sediment and debris such that the bottom of the pond  
22 is level with the outflow pipe and no longer serves its sedimentation function.

23 42. Without adequate detention time for sediments and debris to settle out of  
24 the stormwater into the detention pond, suspended sediments in the incoming City  
25  
26



1 stormwater are instead transported to the Yacht Club Tidelands. The Yacht Club has  
2 observed a substantial increase in sediment buildup in its tidelands in the area where the  
3 City's stormwater discharges, particularly in more recent years. The problem is significant.  
4 Notably, after the Yacht Club last dredged the lagoon in the late 1990s, there was  
5 approximately 6 feet of water at the pier and around the boat slips at zero tide. Today,  
6 even though the Yacht Club has done interim maintenance dredging, there is no longer  
7 any water depth at zero tide. Review of available soundings for these tidelands to confirm  
8 a relationship between sediment buildup in the Day Island Bridge Pond and the  
9 sediment buildup in Yacht Club Tidelands since the soundings indicate the buildup in the  
10 tidelands has predominantly occurred in more recent years as the pond has filled.  
11

12 43. Sediment has accumulated to such an extent in the Yacht Club tidelands  
13 that it is impacting the positioning of the floating marina dock at an average lower low  
14 tide. Due to this sediment buildup, it is now difficult to navigate boats around the marina  
15 and moor boats at the marina.  
16

#### 17 Violations Of the Clean Water Act

18 44. The Clean Water Act makes it unlawful for anyone, including municipalities,  
19 to discharge a pollutant into navigable waters except as authorized by specific sections of  
20 the Act. 33 U.S.C. § 1311(a) and § 1342. The definition of "pollutant" is broad and  
21 includes sediment. 33 U.S.C. § 1362(6); 40 C.F.R. § 122.2; *Driscoll v. Adams*, 181 F.3d  
22 1285, 1291 (11<sup>th</sup> Cir. 1999). Of course, the principal method of regulating such  
23 discharges is the National Pollutant Discharge Elimination System ("NPDES") permitting  
24 process. 33 U.S.C. § 1342.  
25  
26

1           45.     Beginning in January 2007, the City was granted coverage for discharges of  
 2 its collected stormwater under the NPDES Western Washington Phase II Municipal  
 3 Stormwater permit. The Permit, as originally issued and extended, obligates the City to  
 4 repair and maintain the Day Island Bridge Pond, which is a known feature of the City's  
 5 larger stormwater management facilities.

6           46.     Section S4 of the Permit – Compliance with Standards – requires:

7  
 8           A. In accordance with RCW 90.48.520, the discharge of toxicants to  
 9 waters of the state of Washington which would violate any water  
 10 quality standards, including toxicant standards, sediment criteria and  
 11 dilution zone criteria is prohibited. ...

12           B. The Permit does not authorize a discharge in violation of  
 13 Washington State Surface Water Quality Standards (chapter 193-  
 14 201A WAC), Ground Water Quality Standards (chapter 193-200 WAC),  
 15 Sediment Management Standards (chapter 193-204 WAC), or human  
 16 health-based criteria in national Toxics Rule (Federal Register, Vol.  
 17 57, NO. 246, Dec. 22, 1992, pages 60848-60923). ...

18           C. The Permittee shall reduce the discharge of pollutants to the  
 19 maximum extent practicable (MEP).

20           D. The Permittee shall use all known, available, and reasonable  
 21 methods to prevent and control pollution of waters of the State of  
 22 Washington. (Also known as "AKART")

23           47.     Section S5 of the Permit – Stormwater Management Program (SWMP) –  
 24 requires the City to adopt and implement a Stormwater Management Program. The City's  
 25 Phase II NPDES Stormwater Management Program sets for the City's Municipal  
 26 Operations and Maintenance Program at Section 7, which includes maintenance  
 standards for the City's drainage facilities as identified in Appendix B.<sup>2</sup> This SWMP  
 specifically sets maintenance standards for detention ponds within the City's drainage

---

<sup>2</sup> The maintenance standards set forth in Appendix B are from the King County Storm Water Design Manual, which standards were initially adopted by City Ordinance No. 142.

1 system. Relevant to this matter, the SWMP provides that maintenance is required if  
 2 accumulated sediment exceeds 10% of the designed pond depth. In such case, the  
 3 Program requires that sediment be cleaned out to designed pond shape and depth and  
 4 that the pond be reseeded as necessary to control erosion.

5 48. There can be no dispute that the sediment accumulated in the Day Island  
 6 Bridge Pond exceeds 10% of the designed pond depth. Yet, the City has openly admitted  
 7 that, for years, it has not performed any maintenance of the Day Island Bridge Pond  
 8 beyond clearing of vegetation, much less sediment removal mandated by the SWMP  
 9 adopted pursuant to the NPDES mandate. As a result, the Day Island Bridge Pond has  
 10 filled with sediment and debris such that the bottom of the pond is level with the outflow  
 11 pipe and no longer serves its function as a sedimentation pond.  
 12

13 49. In failing to remove the substantial sediment accumulation in the Day  
 14 Island Bridge Pond, the City has not only failed to comply with a discrete and specific  
 15 detention pond maintenance standard in the SWMP, but it has also failed to apply AKART  
 16 to the City's discharges into the Day Island Lagoon. The result is increased sediment flow  
 17 into the Day Island Lagoon, thereby violating the Permit mandate to reduce the discharge  
 18 of pollutants – sediments - to the maximum extent practicable.  
 19

20 50. The City has violated and continues to violate the terms and conditions of  
 21 the SWMP and the Permit, including Section S4(A)-(D) and S5, and, thus, has violated the  
 22 CWA, specifically 33 U.S.C. § 1311(a) and 33 USC § 1342.  
 23

24 **CWA Notice Letter And This City's Continued Refusal To Bring The Pond Into Compliance**

25 51. DIYC has repeatedly brought the matter to the City's attention and  
 26 requested action. On May 19, 2021, for example, DIYC representatives, along with their

1 engineering consultants, met Public Works Director Gary Cooper, Engineering Director  
2 Jack Ecklund and NPDES Coordinator Todd Smith at the Day Island Bridge Pond site.  
3 Unfortunately, the City was unwilling to address the unmaintained Day Island Bridge  
4 Pond.

5           52. At that time, the City acknowledged that the City Stormwater System maps  
6 confirm that the Day Island Bridge Pond is tributary to the City's drainage system. Despite  
7 this fact, the City nonetheless refused to acknowledge the Day Island Bridge Pond as a  
8 part of the City's drainage system for which the City is required to provide maintenance.  
9 The City's stated position at that time was that, since the City found no record of design  
10 drawings or engineering for the initial construction of this stormwater detention pond,  
11 there are no design-based maintenance requirements. The City informed Yacht Club that,  
12 while it apparently accepts responsibility for inspecting the Day Island Bridge Pond  
13 annually and before forecasted rain events; the City feels it has no obligation to remove  
14 accumulated sediment from the Pond.  
15

16           53. The City provided the Yacht Club with the Gray & Osborne Repair Drawings,  
17 but has asserted that Plans were conceptual and that the City took no action to construct  
18 the depicted repairs other than build the maintenance road. Though Mr. Cooper attended  
19 the May 19, 2021 meeting, he did not disclose the subsequent permitting activity and  
20 construction, even though he signed and was the apparent author of the permitting  
21 applications and SEPA Checklist that led to approval of the pond retrofit project.  
22

23           54. By letter dated March 4, 2022 from the Yacht Club's counsel, the Yacht  
24 Club again asked the City to repair and maintain the Day Island Bridge Pond to address  
25 the sediment buildup. The City again failed to act and by letter from the City Attorney  
26

1 dated May 12, 2022, the City again refused to accept responsibility for repairing and  
2 maintaining the Day Island Bridge Pond.

3 55. By letter dated August 9, 2022 from the Yacht Club's counsel, the Yacht  
4 Club provided notice of intent to sue under the CWA, which is the Notice Letter attached  
5 as Exhibit 1.

6 56. Since the Notice Letter, the City has continued to refuse to repair and  
7 maintain the Day Island Bridge Pond, thus negating the pond's sedimentation purpose.

8 57. The City's violations of the CWA not only adversely impacted the Yacht Club  
9 Tidelands, but also degraded the environment generally and the water quality of the  
10 Larger Day Island Lagoon and Puget Sound. These impacts were avoidable had the City  
11 diligently managed and maintained the Day Island Bridge Pond, which maintenance was  
12 affirmatively acknowledged as necessary in the City's first Comprehensive Drainage Plan,  
13 acknowledged as necessary to improve water quality in the City's permit application  
14 submittals, and required by the City's NPDES Permit.

#### 15 16 17 **V. CAUSE OF ACTION**

18 58. The preceding paragraphs and the allegations in the Notice Letter attached  
19 as Exhibit 1 are incorporated herein.

20 59. Defendant's violations described here in and in the Notice Letter  
21 constitutes violations of the terms and conditions of the SWMP and the Permit, including  
22 Section S4(A)-(D) and S5, and, thus, violates the CWA, specifically 33 U.S.C. § 1311(a)  
23 and 33 USC § 1342.

24 60. On information and belief, the violations committed by Defendant are  
25 ongoing or are reasonably likely to continue to occur. Any and all additional violations of  
26



1 the CWA which occur after those described in the Yacht Club's Notice Letter but before  
2 the final decision in this action should be considered continuing violations subject to this  
3 Complaint.

4 61. Without imposition of appropriate civil penalties and the issuance of an  
5 injunction, Defendant will likely continue to violate the CWA to the further injury of the  
6 Yacht Club, its members, and others.

7  
8 62. A copy of the Complaint is being served on the Attorney General of the  
9 United States and Administrator of the U.S. Environmental Protection Agency as required  
10 by 33 U.S.C. § 1365(c)(3).

11 **VI. RELIEF REQUESTED**

12 Wherefore, Plaintiff Day Island Yacht Club requests that this Court grant the  
13 following relief:

14 A. Issue a declaratory judgment that Defendant City of University Place has  
15 violated and continues to violate the CWA, specifically 33 U.S.C. § 1311(a) and 33 USC  
16 § 1342;

17  
18 B. Enjoin Defendant from operating their storm water facilities in a manner  
19 that results in further violation of 33 U.S.C. § 1311;

20 C. Order Defendant to immediately take corrective action to remove sediment  
21 accumulation from, repair or as necessary modify the Day Island Bridge Pond, and to  
22 thereafter continue maintenance of the Day Island Bridge Pond such that it functionally  
23 operates consistent with its purpose, which is sediment detention to improve water  
24 quality of the receiving Day Island Lagoon;  
25  
26

1 D. Order Defendant to take specific actions to remediate the environmental  
2 harm caused by their violations;

3 E. Order Defendant to allow Plaintiff to participate in the development and  
4 implementation of a plan for remediation of the Yacht Club Tidelands;

5 F. Order Defendant to pay civil penalties of \$59,974 per day of violation for  
6 each violation committed by Defendant pursuant to 33 U.S.C. §§ 1319(d) and 1365(a)  
7 and 40 C.F.R. § 19;

8 G. Award Plaintiff their litigation expenses, including reasonable attorneys'  
9 and expert witness fees, as authorized by 33 U.S.C. § 1365(d); and

10 H. Award such other relief as the Court deems appropriate.

11  
12 Dated this 20<sup>th</sup> day of July, 2023.

13  
14 GORDON THOMAS HONEYWELL LLP

15  
16  
17 By



Margaret Y. Archer, WSBA No. 21224  
marcher@gth-law.com  
Attorneys for Plaintiff Day Island Yacht Club

# EXHIBIT 1



Margaret Y. Archer  
Direct: (253) 620-6550  
E-mail: marcher@gth-law.com

August 9, 2022

**Via certified mail, return receipt requested**

Mayor Steve Worthington  
City of University Place  
3609 Market Place West, Suite 200  
University Place, WA 98466

Jack Ecklund  
Director, Engineering & Capital Projects  
Interim Director, Public Works, Parks & Facilities  
City of University Place  
3609 Market Place West, Suite 200  
University Place, WA 98466

RE: NOTICE OF INTENT TO SUE UNDER THE CLEAN WATER ACT

Dear Mayor Worthington and Mr. Ecklund:

I represent the Day Island Yacht Club (“DIYC”), which is a Washington State nonprofit corporation located in the City of University Place at 2120 91<sup>st</sup> Avenue West (253 565-3777). DIYC owns its tidelands, upon which it operates a 108-slip permanent moorage marina for its members. This letter is to provide you with sixty days’ notice of DIYC’s intent to file a citizen suit against the City of University Place (the “City”) under section 505 of the Clean Water Act (“CWA”), 33 U.S.C. § 1365, for the violations described below. The violations result in increased silt laden stormwater that flows into the marina and interferes with vessel mooring and safe use of the pedestrian floating walkway. Any response or correspondence related to this matter should be directed to me at the address provided on the letterhead.

**BACKGROUND**

**The Day Island Bridge Pond**

This Notice involves and arises from the City’s failure to adequately maintain the detention/sediment pond that is located on City property (parcel number 8950003680) and

Reply to:

Tacoma Office  
1201 Pacific Ave., Suite 2100 (253) 620-6500  
Tacoma, WA 98402 (253) 620-6565 (fax)

Seattle Office  
520 Pike St, Suite 2350 (206) 676-7500  
Seattle, WA 98101 (206) 676-7575 (fax)

[4880-1988-0236]

Gordon Thomas Honeywell<sup>LLP</sup>  
August 9, 2022  
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is situated just northwest of where Day Island Bridge Road West travels over Lemon Beach Road West (“Day Island Bridge Pond”). The Day Island Bridge Pond receives large quantities of stormwater collected from a vast area within the University Place stormwater drainage system. It is thus an essential component of the City’s public drainage system. Relevant to DIYC’s concern, the Day Island Bridge Pond drains under a pond embankment berm through an approximately 36” inch culvert, and then discharges into Day Island Yacht Club (“DIYC”) tidelands at Day Island Lagoon through two twin pipes that are located under the BNSF railroad tracks. Notably, the cover page of the City of University Place Stormwater Map is an aerial photograph that prominently depicts the DIYC marina and tidelands that receive the City’s collected stormwater.

The City has failed to maintain the Day Island Bridge Pond. The Pond, which is in a tidal zone, has filled with sediment and debris such that the bottom of the pond is level with the outflow pipe and no longer serves its function as a detention pond for substantial periods. As I am sure you are aware, without adequate detention time for sediments, debris and hazardous chemicals to settle out of the stormwater into the detention pond sediments, those substances are transported to the tidelands. DIYC has observed a substantial increase in sediment buildup up in its tidelands in the area where the City’s stormwater discharges, particularly in more recent years. The problem is significant. Notably, after DIYC last dredged the lagoon in the late 1990s, there was approximately 6 feet of water at the pier and around the boat slips at zero tide. Today, even though DIYC has done interim maintenance dredging, there is no longer any water depth at zero tide. Review of available soundings for these tidelands appears to confirm a relationship between sediment buildup in the Day Island Bridge Pond and the sediment buildup in DIYC tidelands, since the soundings indicate the buildup in the tidelands has predominantly occurred in more recent years as the Pond has filled.

#### **DIYC’s Appeals to the City to Maintain the Day Island Bridge Pond**

DIYC has repeatedly brought the matter to the City’s attention and requested action. On May 19, 2021, for example, DIYC representatives, along with their engineering consultants from Landau Associates, met Public Works Director Gary Cooper, Engineering Director Jack Ecklund and NPDES Coordinator Todd Smith at the Day Island Bridge Pond site. Unfortunately, the City was unwilling to address the unmaintained Day Island Bridge Pond.

The City acknowledged that the City Stormwater System maps confirm that the Day Island Bridge Pond is tributary to the City’s drainage system. Despite this fact, the City nonetheless refused to acknowledge the Day Island Bridge Pond as a part of the City’s drainage system for which the City is required to provide maintenance. The City’s stated position at that time was that, since the City found no record of design drawings or engineering for the initial construction of this stormwater detention pond, there are no design based maintenance requirements. The City informed DIYC that, while it apparently accepts responsibility for



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inspecting the Day Island Bridge Pond annually and before forecasted rain events; the City feels it has no obligation to remove accumulated sediment from the Pond.

Contrary to the City's then-stated position, substantial evidence confirms that the City has acknowledged responsibility for the Day Island Bridge Pond for decades and was long ago on notice of the clear need for ongoing maintenance to avoid the detrimental effects of sediment buildup.

To begin, the Day Island Bridge Pond, was the subject of state court litigation and the City became a party to that litigation shortly after it incorporated in 1995. Notably, the trial court in that action expressly found that the City "assumed jurisdiction and control, legally and factually, over the storm sewer system within the boundaries of the City of University Place."<sup>1</sup> This storm sewer system included the Day Island Bridge Pond. The earlier asserted state law claims, which did not assert against the newly incorporated City any claims based on failure to maintain the pond,<sup>2</sup> were resolved in 1997 through an accepted Offer of Judgement. But the litigation clearly put the City on notice that, with incorporation, the City assumed a duty to maintain the Day Island Bridge Pond along with its other stormwater management facilities.

Consistent with that understanding, the following year, the City adopted University Place Ordinance No. 201 on August 17, 1998. The Ordinance, entitled "An Ordinance of the City of University Place, Washington, adopting a Comprehensive Storm Drainage Plan," confirms that the City acknowledged and assumed responsibility for the Day Island Bridge Pond.

Ordinance 201 expressly stated: "the City through this Comprehensive Storm Drainage Plan has identified problem areas requiring capital investments for storm drainage systems *to protect citizens and property*," and ..."the City's storm drainage system *is in need of on-going maintenance to assure the reliability of the drainage system*, to extend its useful life, and to enhance their performance in conveying and treating flows." The adopted Storm Drainage Plan, which the City acknowledged as "an official regulation of the City," specifically identified the Day Island Bridge Pond as part of the system and in need of repair to address sediment build up.

The purpose of the 1998 Storm Drainage Plan was stated in chapter 1 of the Plan:

---

<sup>1</sup> *Day Island Yacht Club v. Pierce County, City of Tacoma and City of University Place*, Pierce County cause no. 90-2-00308-1, (Order Denying and Partially Granting Motion for Summary Judgment dated December 6, 1996).

<sup>2</sup> The prior litigation also did not assert any claims under the CWA.

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Since its incorporation, the City of University Place has assumed the responsibility for surface and stormwater management within the City's boundaries. There currently exist a number of stormwater-related problems within the City. Unless proper surface water management strategies are implemented, continued development will increase pressures on the drainage infrastructure and receiving waters, and opportunities to cost effectively correct existing problems may be lost. To develop such strategies, the city of University Place authorized Earth Tech to conduct studies of the City's surface and stormwater systems and prepare a Surface Water Plan.

Toward the above-stated objective, the Plan included a Capital Improvement Program to address "a number of problems in the City's drainage infrastructure" and recommended specific improvements. Among the "problems" identified was the Day Island Bridge Pond. More specifically, the Plan identified a need to reconfigure and repair this Pond to address sediment build up, as well as the need to provide ongoing pond maintenance, including sediment removal. The project was identified in the Plan as Project 11 and is described at page 6-4:

The pond known as the 'Day Island Bridge' pond is located immediately east of the railroad tracks and north of the Day Island Bridge Road. This pond was historically the responsibility of the City of Tacoma [prior to the City's incorporation]. The pond discharge is tidally influenced as evidenced by marine growth around the inlet of the twin discharge pipes. *With more frequent cleaning, the pond's sediment removal efficiency can be enhanced. This will require improvement of access road into the pond to facilitate regular maintenance.*

*The pond should also be reconfigured to improve sediment removal and concentrate sediment deposition within in a smaller area in the facility, thereby enhancing discharge quality and maintenance efficiency. The pond should be excavated to remove accumulated sediments and create multiple cells to promote sedimentation.* (Emphasis added.)

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It appears that this Project 11 was indeed advanced in some form or another.<sup>3</sup> At the May 2021 meeting, the City provided DYIC a set of October 1999 draft or preliminary drawings by Gray & Osborn, Inc. consulting engineers. The drawings were for pond repairs and appeared to be preliminary, rather than approved designs. But the existence of these preliminary drawings indicates that, regardless of the completeness of the City's maintained records and files, there is a design basis for required maintenance program. Despite that the drawings were intended to depict proposed repair, they still include details of the original pond design, including pond bottom elevations, inlet and outlet pipe inverts. These drawings reveal:

- There was proposed construction of a berm within the pond, which appears to be intended to facilitate pond maintenance by creating a forebay to promote settlement of solids and prevent tidal backflow into the pond. Notably, this berm was observed during the May 19, 2021 site visit.
- The bottom of the pond is designed to be 2 feet below the invert of the 36" concrete outlet pipe (upstream of the twin concrete culverts that discharge into the DIYC lagoon). The apparent purpose of this 2-foot sump is to provide a means for sediment to settle before discharging out of the pond and into the lagoon. Despite this, based on observations of existing site conditions, the bottom of the pond sits approximately at the same elevation as the 36" concrete pipe invert.

Though DIYC is not currently aware of what repair plans were ultimately implemented,<sup>4</sup> the October 1999 preliminary repair drawings evidence that the City (1) accepted responsibility for the Day Island Bridge Pond, and (2) again acknowledged this Pond was in need of repair and maintenance to address sediment buildup. The City brought the plans to the May 2021

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<sup>3</sup> Documents obtained through public records request reveal that the City completed two Washington Joint Aquatic Resource ("JARPA") Applications to remove silt and sedimentation from this pond. One proposed annual removal of 50 cubic yards of sedimentation over a period of five years. The other JARPA application proposed a one-time removal of 250 cubic yards of sedimentation in August of 1998. Records have not been produced that indicate, one way or another, if any removal of sediments from the pond occurred pursuant to these applications. But the applications again evidence that the City has long understood that maintenance is required to address sediment accumulation in the Day Island Bridge Pond.

<sup>4</sup> The plans that the City provided at the May 19, 2021 meeting are entitled 27<sup>th</sup> Street West Detention Pond Repair and are enclosed with this letter. DIYC member Jon Blado submitted a public records request in October 2021 seeking any documents in the City's possession related to those preliminary plans, but the City responded that they found no responsive records. DIYC has since made another more expansive public records request. Documents have been produced in response to that request, but we have yet to ascertain a definitive answer regarding the implementation of the planned repairs.

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meeting, evidencing that it clearly remains aware in the present day. Likewise, they admitted at that meeting that, while they do not regularly maintain the Pond, the City does regularly inspect for functionality, evidencing again that the City comprehends on some level that the Pond's functionality impacts the functionality of the City's larger stormwater drainage system.

All of the above information was presented to the City by correspondence from me dated March 4, 2022. Through that correspondence, the DYIC again requested the City to voluntarily acknowledge responsibility for the Day Island Bridge Pond and take prompt action to fully abate and remediate the problem. DIYC also informed the City that it was prepared to meet with the City to discuss a mutually acceptable resolution; but they were prepared to take legal action as necessary to obtain relief from the continuing injuries to DYIC from sediment accumulation in their tidelands. While the March 4 correspondence focused on remedies available under state common law claims, DIYC also reminded the City that it is obligated to repair and maintain the Day Island Bridge Pond under the CWA.

The City responded by correspondence from the City Attorney dated May 12, 2022. Though this time the City did not deny that the Day Island Bridge Pond is part of its larger stormwater management facilities, it once again refused to take action to address this unmaintained Pond. In fact, the City did not even express interest in meeting with DIYC to discuss solutions to the problem.

DIYC remains committed to obtaining relief from the continuing injuries inflicted by the City's refusal to repair and maintain the Day Island Bridge Pond. DIYC has already filed with the City a Tort Claim to put the City on formal notice of its state common law tort claims. This letter is intended to put the City on formal notice of DIYC's intent to commence a citizens' suit under the CWA as a separate avenue to obtain necessary relief.

### **VIOLATIONS OF THE CWA**

The Clean Water Act makes it unlawful for anyone, including municipalities, to discharge a pollutant into navigable waters except as authorized by specific sections of the Act. 33 U.S.C. § 1311(a) and § 1342. The definition of "pollutant" is broad and includes sediment. 33 U.S.C. § 1362(6); 40 C.F.R. § 122.2; *Driscoll v. Adams*, 181 F.3d 1285, 1291 (11<sup>th</sup> Cir. 1999). Of course, the principal method of regulating such discharges is the National Pollutant Discharge Elimination System ("NPDES") permitting process. 33 U.S.C. § 1342.

The City was granted coverage for discharges of its collected stormwater under the NPDES Western Washington Phase II Municipal Stormwater permit ("Permit"), issued by the Washington State Department of Ecology effective August 1, 2013. The Permit obligates the City to repair and maintain the Day Island Bridge Pond.

Section S4 of the Permit – Compliance with Standards – requires

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A. In accordance with RCW 90.48.520, the discharge of toxicants to waters of the state of Washington which would violate any water quality standards, including toxicant standards, sediment criteria and dilution zone criteria is prohibited. ...

B. The Permit does not authorize a discharge in violation of Washington State Surface Water Quality Standards (chapter 193-201A WAC), Ground Water Quality Standards (chapter 193-200 WAC), Sediment Management Standards (chapter 193-204 WAC), or human health-based criteria in national Toxics Rule (Federal Register, Vol. 57, NO. 246, Dec. 22, 1992, pages 60848-60923). ...

C. The Permittee shall reduce the discharge of pollutants to the maximum extent practicable (MEP).

D. The Permittee shall use all known, available, and reasonable methods to prevent and control pollution of waters of the State of Washington. (Also known as “AKART”)

Section S5 of the Permit – Stormwater Management Program (SWMP) – requires the City to adopt and implement a Stormwater Management Program. The City’s Phase II NPDES Stormwater Management Program, which was adopted in 2021, sets for the City’s Municipal Operations and Maintenance Program at Section 7, which includes maintenance standards for the City’s drainage facilities as identified in Appendix B. This SWMP specifically sets maintenance standards for detention ponds within the City’s drainage system. Relevant to this matter, the SWMP provides that maintenance is required if accumulated sediment exceeds 10% of the designed pond depth. In such case, the Program requires that sediment be cleaned out to designed pond shape and depth and that the pond be reseeded as necessary to control erosion.

There can be no dispute that the sediment accumulated in the Day Island Bridge Pond exceeds 10% of the designed pond depth. Yet, the City has openly admitted that, for years, it has not performed any maintenance of the Day Island Bridge Pond, much less sediment removal mandated by the SWMP adopted pursuant to the NPDES mandate. As a result, the Day Island Bridge Pond has filled with sediment and debris such that the bottom of the pond is level with the outflow pipe and no longer serves its function as a detention pond for substantial periods. In failing to remove the substantial sediment accumulation in the Day Island Bridge Pond, the City has not only failed to comply with a discrete and specific detention pond maintenance standard in the SWMP, but it has also failed to apply AKART to the City’s discharges into the Day Island Lagoon. The end result is increased sediment flow

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into the Day Island Lagoon, thereby violating the Permit mandate to reduce the discharge of pollutants – sediments – to the maximum extent practicable.

The City has violated and continues to violate the terms and conditions of the SWMP and the Permit, including Section S4(A)-(D) and S5, and, thus, has violated the CWA, specifically 33 U.S.C. § 1311(a) and 33 USC § 1342.

### CONCLUSION

The above-described violations reflect those indicated by the information currently available to the DIYC. These violations are ongoing. If appropriate corrective action is not taken in the 60-day notice period, DIYC intends to sue for all violations, including those yet to be uncovered after the date of this notice of intent to sue. DIYC believes that this notice of intent to sue sufficiently states grounds for filing suit.

The above-described violations subject the City, as violator, to civil penalties of up to \$59,973 per day per violation and DIYC will seek assessment of such penalties if it commences suit. 33 USC § 1319(d). In addition, DIYC will seek injunctive relief to prevent further violations of the CWA, 33 U.S.C. § 1311 and 33 U.S.C. § 1342, and such other relief permitted by law, including abatement of the significant sediment accumulation in the Day Island Lagoon. Finally, DIYC will seek litigation costs, including attorneys' fees pursuant to 33 U.S.C. § 1365.

During the 60-day notice period, DIYC is willing to discuss effective remedies for the violations addressed in this letter and settlement terms. If you wish to pursue such discussions in the absence of litigation, we suggest that you initiate those discussions within 10 days of receiving this letter so that a meeting date can be arranged and so that negotiations may be completed promptly. Please be advised the DIYC intends, at the close of the 60-day notice period, or shortly thereafter, to file a citizen suit against the City under 33 U.S.C. § 1365 for violations of the CWA. We do not intend to delay the filing of a complaint if discussions are continuing when the notice period ends.

Very truly yours,



Margaret Y. Archer

cc: Michael S. Regan, Administrator, U.S. EPA  
Casey Sixkiller, Region 10 Administrator, U.S. EPA  
Laura Watson, Director, Washington State Department of Ecology  
Matt Kaser, University Place City Attorney  
Todd Smith, University Place NPDES Coordinator  
Day Island Yacht Club